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FRESNO COUNTY SUPERIOR COURT
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

CHILDREN AND FAMILIES COMMISSION OF FRESNO COUNTY, et al,

Petitioners and Plaintiffs,

vs.

EDMUND G. BROWN, JR., et al,

Respondents and Defendants

Case No.: 11CECG01077

ORDER ON MOTION FOR PEREMPTORY WRIT OF MANDATE

The Petition For Peremptory Writ of Mandate filed by Petitioner Children and Families Commission of Fresno County, et al came on regularly for hearing on August 30, 2011 in Dept. 51, the Honorable Debra J. Kazanjian presiding. Petitioners and Plaintiffs Children and Families Commission of Fresno County, First Five Solano County Children and Families Commission, First Five Merced County, and Madera County Children and Families Commission were represented by Robert Wilkinson. Petitioner and Plaintiff First Five LA was represented by Steven Orr. Petitioners and Plaintiffs Children and Families Commission of Orange County and Riverside County Children and Families Commission were represented by M. Lois Bobak. All Respondents and Defendants were represented by Deputy Attorneys General Mark R. Beckington and Seth Goldstein.

The court, after having read and considered all of the papers submitted in support of, in opposition to, and in rebuttal to the Petition For Peremptory Writ of Mandate, and after having read and considered all replies and other papers on file, and after considering the oral arguments of counsel at the hearing, the court rules as follows:

This coordinated action raises the legal issue of whether AB 99, enacted by the legislature and signed by the Governor on March 24, 2011, is a valid amendment to Prop 10, an initiative passed by the voters on November 3, 1998.

"The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." Cal. Const., Art. II, §10(c).

A legislative amendment adopted without compliance with the amendment procedures of an initiative act is void. ***Franchise Tax Bd. v. Cory*** (1978) 80 Cal.App.3d 772, 776.

In ***Amwest Surety Ins. Co. v. Wilson*** (1995) 11 Cal.4th 1243, the court considered the scope of legislative authority where an initiative measure grants the Legislature the power to amend the measure "to further its purposes." ***Amwest*** involved Proposition 103, which imposed a rate rollback on all insurers and required prior approval of subsequent rate increases, and which provided that "[t]he provisions of this act shall not be amended by the Legislature except to further its purposes."

The Legislature subsequently added Ins. Code §1861.135, exempting surety insurers from the rate rollback and rate approval provisions. In holding that the statute was invalid because it did not further the purposes of Proposition 103, the court explained that under Cal. Const., Art. II, §10(c), the Legislature may not amend an initiative measure unless the electors approve or the measure itself permits amendment without approval. It noted that the power of the voters is absolute and includes the

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power to permit legislative amendment subject to conditions attached by the voters. 11 Cal.4th 1251.

The opinion recognizes that initiative measures commonly include a provision authorizing the Legislature to amend the initiative without voter approval only if the amendment furthers the purpose of the initiative but it held that the limitations imposed by Cal. Const., Art. II, §10(c) "must be strictly construed" and that any such grant of authority "must be given the effect the voters intended it to have," because adoption of a deferential standard of review might cause the drafters of future initiatives to withhold legislative authority completely, a result that would diminish both the initiative and legislative processes. 11 Cal.4th 1255-1256.

The court then started with the presumption that the Legislature acted within its authority and stated that it would uphold the validity of section 1861.135 "if, by any reasonable construction, it can be said that the statute furthers the purposes of Proposition 103." 11 Cal.4th 1256.

But it also stated that in determining the purposes of an initiative measure, the court should look to many sources, including the historical context and the ballot arguments, and was not limited to the express statement of purpose included in the initiative itself. 11 Cal.4th 1256.

It found, based on its analysis of the materials, that two major purposes of Proposition 103 were to reduce the rates for all insurance and to replace the former competitive system for regulating insurance with a system in which the Insurance Commissioner approves rates prior to their use. 11 Cal.4th 1259.

While the plaintiff argued that Ins. Code §1861.135 did further the purposes of Proposition 103 by clarifying whether surety insurance was meant to be included within the ambit of the initiative, the court found that it was clear prior to the passage of Proposition 103 that the provisions regulating insurance rates applied to surety insurance and that Proposition 103 fundamentally altered the method of regulating insurance rates but did not alter the types of insurance that were regulated.

It thus found that the provisions of Proposition 103 clearly applied to surety insurance, and the Legislature's action constituted an alteration rather than a clarification. 11 Cal.4th 1260, 1261.

> The question before us is not whether exempting surety insurance from some of the provisions of Proposition 103 furthers the public good, but rather whether doing so furthers the purposes of Proposition 103. We hold that it does not. Because Proposition 103 expressly permits its provisions to be amended without voter approval, but only when to do so would further the purposes of the initiative, section 1861.135 is invalid.

11 Cal.4th 1265.

Similarly in ***Foundation for Taxpayer & Consumer Rights*** (2005) 132 Cal.App.4th 1354, the court addressed a separate attempt to amend Prop 103 by overriding a new regulation issued by the Insurance Commissioner restricting insurance companies from discounting insurance rates based on whether an individual was previously insured. In finding SB 841 invalid, the court explained:

> Sen. Bill 841 does not further the purposes of Proposition 103 because it facially contradicts the voters' intent that "[t]he absence of prior automobile insurance coverage, in and of itself, shall not be a criterion for determining eligibility for a Good Driver Discount policy, or generally for automobile rates, premiums, or insurability." (§1861.02, subd. (c).)
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> The Legislature cannot simply in the guise of amending Proposition 103 undercut and undermine a fundamental purpose of Proposition 103, even while professing that the amendment "furthers" Proposition 103. The power of the Legislature may be "practically absolute," but that power must yield when the limitation of the Legislature's authority clearly inhibits its action. (Amwest, ***supra,*** 11 Cal.4th at p. 1255.) Since Sen. Bill 841 flies in the face of the initiative's purposes, it exceeds the Legislature's authority.

Foundation for Taxpayer & Consumer Rights v. Garamendi, supra, 132 Cal. App. 4th at 1371.

The court also found AB 841 to be inconsistent with Prop 103 because "it arrogates to the Legislature the Insurance Commissioner's exclusive authority to adopt optional rating factors, contrary to Proposition 103." ***Id.*** at 1362.

Shaw v. People ex rel. Chiang (2009) 175 Cal.App.4th 577, 595-596, examined whether a legislative amendment to Prop 116 (an initiative which established the Public Transportation Account and limited use of spillover gas tax revenue to the purpose of transportation planning and mass transportation) was a valid legislative act. The court found the legislature exceeded its authority enacting a statute that allowed it to transfer $409 million from the Public Transportation Account to the general fund for use to cover other "transportation related" expenses, explaining:

> The will of the electorate is involved in our consideration of initiative measures like Proposition 116 as well as Article XIX A and Article XIX B. Statutes and constitutional provisions adopted by the voters "must be construed liberally in favor of the people's right to exercise the reserved powers of initiative and referendum. The initiative and referendum are not rights 'granted the people, but ... power[s] reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people" [citation], the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process" [citation]. "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right not be improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserved power, courts will preserve it.'" [Citations.]" In fact, "[t]he people's reserved power of initiative is greater than the power of the legislative body. The latter may not bind future Legislatures [citation], but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people may bind future legislative bodies other than the people themselves."

Shaw v. People ex rel. Chiang, supra, 175 Cal. App. 4th at 596.

Gardner v. Schwarzenegger (2009) 178 Cal.App.4th 1366, 1374, was a challenge to a legislative amendment to Prop 36, the initiative that required diversion for first and second time non-violent drug offenders. The legislative amendment to the statues adopted by Prop 36 allowed courts to threaten these diverted offenders with incarceration if they violated their probation.

While the defendants argued that the bill furthered the "main" purpose of Prop 36 by making it more likely that drug offenders would stay in the diversion programs, the court found it controverted the other purposes expressed in the initiative and the

materials on which the voters based their decision to vote for it, including the freeing-up of jail cells for violent offenders and saving money by affording treatment options in lieu of incarceration.

The opinion describes the process courts should use to determine the "purpose" of an initiative as follows:

> [w]e examine the initiative as a whole, and are guided by, but not limited to, its general statements of purpose. (***Amwest, supra***, 11 Cal.4th at 1257.) We must give effect to an initiative's specific language, as well as its major and fundamental purposes. (***Id.*** at 1259, 1260 [identifying initiative's "major purposes"; argument that initiative had "a narrower scope than would follow from its broad language" rejected "'in view of the particular language'" used]; ***Foundation, supra***, 132 Cal.App.4th at 1370 [citing initiative's "fundamental purpose"; amendment must not " 'violate[] a specific primary mandate' " or " 'do violence to specific provisions' " of the initiative].) Although legislative findings " 'are given great weight' " (***Amwest,*** 11 Cal.4th at 1252), the issue is not whether the legislation "furthers the public good, but rather whether [it] furthers the purposes of [the initiative]" (***id.*** at 1265).

178 Cal.App.4th at 1374.

Here too, respondents try to characterize the "undisputed purpose" of Prop 10 as being to fund programs for preschool children, not to vest the commissions with exclusive funding authority or to ensure that the tobacco tax revenue is used only to expand or supplement services to the target population, and not to replace funding for existing levels of service.

But this is despite the clear statements, both in Prop 10 itself and in the ballot arguments presented to the voters as described on pages 44-49 of plaintiffs' exhibit 16, that Prop 10 is intended to "emphasize local decision-making" and "provide for greater local flexibility in designing delivery systems."

See also ***California Assn. of Retail Tobacconists v. State of California***, (2003) 109 Cal. App. 4th 792, the only case cited by either side that examined the intent of the voters in enacting Prop 10. In finding Prop 10 was not an unconstitutional delegation of authority over public funds to an institution not under the exclusive control of the state, the Supreme Court explained:

> [T]he people exercised the legislative power to appropriate funds with specific guidance of fund allocation. As to the county commissions, the people restricted their allocation of funds to promote local decision-making, enabling the commissions to tailor their programs to the specific needs of their counties. Nevertheless, as we have already explained, reasonable specificity and direction is obtained by the Act requiring the local plan to be consistent with the goals of the initiative and the CCFC guidelines. CC has not proffered authority invalidating lump sum appropriations or continuous appropriations. Insofar as CC challenges the Act for illegally delegating legislative policymaking power to the commissions by leaving to them the fundamental policy matters or by not providing adequate direction for the implementation of that policy (citation omitted) the Act and the statutory scheme it implements do provide the necessary guidance for the expenditure of the challenged appropriations to withstand this allegation of unconstitutional delegation of legislative authority.

California Assn. of Retail Tobacconists v. State of California, supra, 109 Cal. App. 4th at 831-832.

Respondents also claim that there is nothing on the face of AB 99 that violates the ban on supplanting vs. supplementing funds for existing programs, pointing to the fact that the legislature has yet to appropriate any Prop 10 funds for any specific health and human service programs. They thus contend that the court can't find the statute facially invalid because it is at least possible that the legislature will not appropriate funds for uses prohibited by Prop 10.

But Section 1(c) of AB 99 (page 2 of plaintiffs' exhibit 27) specifically recognizes that Prop 10 requires the majority of tax revenue to be spent by local commissions in accordance with locally developed and approved strategic plans, and subsection (d) states that the intent of AB 99 is to address the fact that existing services to young children in many counties have been defunded resulting in a negative impact on the beneficiaries of Prop 10 because the local commissions are prevented by the terms of Prop 10 from using those funds to make up for the loss.

The Bill essentially states that its intent is to transfer the funds out of the local commissions to get around that prohibition by allowing the state legislature to do what Prop 10 prevents the commissions from doing.

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See also subsection (g), which tries to rationalize that apparent contradiction by saying:

> Legislation to authorize the transfer of a specified amount of funding from state and local children and families trust funds in times of fiscal emergency, to fund essential health and human services for children from birth through 5 years of age, when no other funding is available for these purposes, would not result in supplanting existing levels of services in circumstances where these services are no longer being funded at all. Rather, requiring Proposition 10 funds to be used in this manner would help counties to achieve the act's overall objective in promoting, supporting and optimizing early childhood development.

If the legislature could use that rationale to fund existing programs that have been defunded, the local commissions could do the same thing if they determined the re-funding of services that had been cut to be a priority. Using that rationale, the State could cut Medi-Cal funding entirely and replace it all with Prop 10 funds, claiming at the same time that they were not "supplanting" existing services because the services no longer existed.

Though respondents acknowledge that Rev. & Tax Code §30131.4 (part of Prop 10) provides that "no moneys in the California Children and Families Trust Fund shall be used to supplant state or local General Fund money for any purpose," and that those funds shall be used only to supplement existing levels of service and not to fund existing levels of service," they see no inconsistency in putting the money in a new pot to do exactly what Prop 10 said the commissions could not do.

Respondents also point to the severe budget crisis that AB 99 was specifically designed to address, noting the legislative finding that shortfalls had forced counties "to eliminate essential health and human services to children that historically have been paid for with state funds" [citing exhibit 31, §1(d)].

But that argument is disingenuous in that it was the legislature that "chose" to cut funding to existing services instead of taking what might be the unpopular step of raising revenue. Counties have been forced to cut services because the legislature stopped providing state funds to pay for them, and AB 99 is clearly intended to allow the

legislature to replace those budget cuts with tobacco tax revenues currently held by the county commissions.

Respondents admit at page 10 of their opposing memo that Gov. Brown initially proposed replacing $1 billion of general funds in the Medi-Cal budget with $1 billion from the Prop 10 Trust Fund, but then eliminated that proposal from the May Revision in large part due to this legal challenge.

But while they claim that there is nothing on the face of AB 99 that requires use of the diverted funds for supplanting funding to existing services, they also admit that if revenues identified in the May Revision fall short of what is projected (a contingency that, according to recent news reports, appears to have occurred), additional funds will need to be found or services included in the adopted budget will need to be further cut, and AB 99 offers a source for those additional funds by giving the legislature authority to use them for those purposes.

As petitioners note in their reply, there is an internal inconsistency in respondents' position in that the argument in AB 99 for making it an "urgency measure" was that the funds that would be transferred were necessary to replace existing general fund revenue for existing programs. See e.g. §1(d) and (e):

> (d) As other funding sources have become increasingly unavailable, counties throughout the state have been forced to eliminate essential health and human services to children that have historically been paid for with state funds. However, although many county children and families commissions maintain substantial balances in their local children and families trust funds, they are unable to use Proposition 10 funds to make up the shortfall in funding for these programs because of the act's prohibition against supplanting existing levels of service. Consequently, these services, if provided at all, are provided to a fraction of the children who need them. This prohibition is therefore resulting in service levels and outcomes that are contrary to the intent of Proposition 10.
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> (e) Absent this solution, substantial reductions would be needed in state programs that currently provide for the health and well-being of vulnerable children and their families.

See also section 6 of AB 99 which states: "This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the

meaning of Article IV of the constitution and shall go into immediate effect. The facts constituting the necessity are:

> In order for health services for children through five years of age to be preserved in the 2011-2012 fiscal year, it is necessary for this act to take effect immediately."

See exhibit 31 at Bates 1672.

Despite that clear statement of intent, respondents nevertheless argue that the court can't find the Bill invalid because the state won't "necessarily" use the funds for the prohibited purpose of supplanting general funds.

As pointed out in petitioner's reply, the finding of "urgency" was constitutionally mandated by Art. 4, §8(d) of the state Constitution, which authorizes the adoption of urgency statutes only when "necessary for the immediate preservation of the public peace, health or safety." The Constitution requires that each statute adopted as an urgency measure set forth "a statement of the facts constituting the necessity."

As petitioners argue, the constitutionally-required findings cited above are therefore as much a part of AB 99 as the three specific statutes enacted and reflect the inconsistency between Prop 10 and these legislative "amendments."

As for the specific statutes enacted by AB 99, respondents contend that even if the court were to find that a fund transfer from the Prop 10 trust funds to the newly created Health and Human Services Fund established by Health & Safety Code §130156 exceeded the legislature's powers, this "does not mean the Legislature's creation of [a new fund] is improper or invalid" [citing ***Shaw v. Chiang, supra,*** 175 Cal.Ap..4th at 602].

In ***Shaw v. Chiang***, the new fund was the Mass Transportation Fund. The court noted that the legislature had the power to create the fund but not to transfer spillover gas taxes generated by prop 106 into that new fund since the new fund didn't restrict use to mass transportation projects as did the PTA Trust Fund. That same reasoning would arguably apply to the proposed fund diversion in this case as well, assuming the

court can review each provision of AB 99 separately without regard to whether the bill as a whole exceeded the legislature's authority.

Health & Safety Code §130157 directs transfer of $50,000,000 from the State Commission's Trust Fund into the new Children and Families Health and Human Services Fund. Respondents note that Prop 10 authorizes the State Commission to use a portion of its fund for "expenditures to ensure that children are ready to enter school," claiming that this necessarily includes using it for health care and related expenses.

They then point to the State Commission's "Unallocated Account" [see §130105(d)(1)(F)] noting that it allows 2% of the State Commission's funds to be used "for any of the purposes of this Act described in §130100" except for administrative functions of the State Commission.

They also claim that the State Commission is authorized to transfer funds to the "Unallocated Account" from all of its accounts other than the Administration Account, claiming that this makes virtually all of its funds available for any purpose authorized by §130100, citing §130105(d)(1)(A-D) as authority for this statement.

But there is no such authorization in the cited sections. Rather subsection (F) allows transfer from the "Unallocated Account" into any of the other subaccounts except the Administrative Account. Subsection (G) then provides that if the State Commission is enjoined by a court from using any of its funds for any of the purposes described in subsections (A) to (F), those funds shall be available for mass media communications concerning the need to eliminate smoking use by pregnant women and children under 18. It does not allow that money to be spent for any of the other designated purposes.

And subsection (H) provides that any funds in any of these specific accounts that aren't spent or encumbered within any applicable period must "revert to and remain in the same account for the next fiscal period." Thus it doesn't appear that the State Commission has discretion to use its 20% other than by the formula set out in subsections (A) through (F).

Respondents also point out that §130157 provides that the transfer of the $50,000,000 is to occur "upon approval of the State Commission," and they claim that there is no evidence that the State Commission has any objection to the transfer. They further argue that since appointments to the State Commission are under the control of the Governor and legislature (per §130115) it is clear the voters intended to allow those branches to exercise ultimate control over the funds allocated to the State Commission and over how those funds are spent.

But that assertion appears to be premised on respondents' claim that most of the 20% of the money that is allocated for appropriation by the State Commission can be transferred by that Commission to any of the subaccounts except the administrative account, when it in fact appears that the State Commission's discretion as to how those funds are to be spent is limited. And it doesn't address at all the fact that AB 99 imposes no prohibition against use of the $50,000,000 to "fund existing levels of service" or to "supplant state or local General Fund money," in clear contravention of §30131.4.

As for Health & Safety Code §130158, the section that directs the county commissions to transfer to the newly created state fund $950,000,000 from the combined balances of all the county Children and Families Trust Funds (subject to several exemptions), respondents contend that this transfer "furthers the core goals of Prop 10" by ensuring that these funds will be spent on health and human services for children up to age five thus promoting the healthy development of children, one of the stated purposes of Prop 10.

In support of that argument they point to §130140 as requiring county commission expenditures to be made pursuant to a properly adopted strategic plan "for the support and improvement of early childhood development within the county." They thus claim that §130158 "targets the same goals as §1340140," and they argue that the legislature's decision to prioritize Prop 10 funding by ensuring that young children

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continue to receive basic health care services furthers the goal of Prop 10 and is consistent with its purposes.

However that ignores that portion of the cited statute that directs county commissions to determine priorities for use of the 80% funds based on the specific needs of each county and a strategic plan adopted by locally appointed county commissions after public hearings, rather than allowing the legislature to determine those priorities.

And by claiming that the legislature has prioritized ensuring that the target population "*continue* to receive basic health care services," they are essentially acknowledging that the legislative intent is to use these funds to "fund existing levels of service."

They address the "local control" aspect of Prop 10 by claiming that nothing in the initiative suggests that the voters intended to insulate the local commissions from any legislative amendment or to deprive the legislature of the ability to provide other methods of distributing tax revenue in the midst of a fiscal crisis. But again that ignores the clear language of Prop 10 that specifies that the 80% funds to be allocated to the county commissions can only go to counties that comply with §130140, by:

1. appointing county commissions with members drawn from specified categories including recipients of project services, educators specializing in early childhood development, representatives of local child care resource or referral agencies, representatives of local organizations for prevention or early intervention for families at risk, representatives of community based organizations that have the goal of promoting and nurturing early childhood development, representatives of local school districts, and representatives of local medical, pediatric or obstetric associations [see §130140(a)(1)(A)]
2. adopting an adequate and complete county strategic plan with specified components [see §130140(a)(1)(C)]
3. conducting at least one public hearing before each strategic plan is adopted and before each periodic review of the county's strategic plan [see §130140(a)(1)(D) and (E)]

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There are no such requirements in AB 99 for expenditure of the portion of the 80% allocation that is to be diverted to the new Children and Families Health and Human Services Fund.

Respondents essentially try to limit the "stated purpose" of Prop 10 to being the provision of services to preschool children and their families, ignoring all of the specific criteria of how the decision of what services are to be funded must be made.

They point to ballot arguments in favor of Prop 10 as reflected in exhibit 16 at page 48 claiming that they focus on the services that would be provided for preschool children and not on the local commission structure.

While they acknowledge the highlighted statement in that ballot argument that "PROP 10 IS FOR LOCAL CONTROL-NOT BIG GOVERNMENT," they argue that that statement was directed at countering concerns that Prop 10 would create a large bureaucracy, not that it was to promote the creation of 58 new county commissions.

And while they acknowledge that the ballot argument also states that "a local commission, including experts in health care, education and child care will spend the money on programs that meet the priorities of parents in each community," they attempt to characterize that statement as merely explaining how funds would be divided between the state commissions and local commissions.

Respondents argue that the statement in Prop 10 that "moneys allocated and appropriated to county commissions...shall be expended only for the purposes authorized by this act and in accordance with the county strategic plan approved by each commission" is only intended to restrict how the county commissions spend their funds, and not to constrain the ability of the legislature to "further the measure through appropriate amendments."

But the Proposition clearly requires decisions on how the 80% funds are to be spent to be made by local experts and community representatives, while AB 99 clearly divests the mandated commissions of that authority and vests it with the legislature. To

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claim that transferring decision-making from local communities to the state legislature is "consistent with" Prop 10 is like asking the court to find that black means white.

They further argue that the provision that unexpended funds in the local trust accounts are to "revert to and remain in the same local Children and families Trust Fund for the next fiscal period" is not inconsistent with AB 99's transfer of such funds to an unrestricted State Fund controlled by the legislature, claiming that that Prop 10 provision is "obviously designed to ensure that local commissions do not divert unspent funds to non-Prop 10 accounts or purposes, not to prevent the Legislature from prioritizing Prop 10 expenditures when necessary." They argue that "if the voters had intended such a result, they could have easily so provided."

But that argument ignores the fact that the voters *did* so provide, by specifying in Prop 10 that the 80% allocation had to be distributed pursuant to the process described in §130105(d)(2) and §130140. Respondents are asking the court to ignore those specific provisions and find that as long as the money is spent to provide services to children age 0-5, it is "consistent with" the purposes of Prop 10. If the voters had intended that broad authorization, "they could easily have so provided."

Respondents then argue that the fact that Prop 10 provided for reallocation of funds from the proportionate share of counties that chose not to set up county commissions to counties that did establish commissions, shows that "the voters left open the possibility that the legislature could step in and amend the measure to direct Prop 10 funding for the benefit of all children in the State."

But again, if the drafters of Prop 10 and the voters who adopted it wanted to make sure that the children in those non-participating counties received the benefit of the 80% funds that were allocated to the county commissions, they wouldn't have provided that the funds that would otherwise have gone to those counties were to be reallocated to participating counties; they could easily have provided that those funds were to go to either the State Commission or to the legislature for provision of services to children in the non-participating counties.

The fact that they did not shows that the voters wanted the full 80% to be used on programs that were developed with input from both specified categories of experts in related fields and by local commissions accountable to the local communities.

Respondents argue that AB 99 doesn't do anything to alter the county commission structure, change the powers or duties of the commissions, or deprive them of all or even the greater part of their resources to carry out programs consistent with the purposes of Prop 10. They claim that it leaves the county commissions with substantial resources to implement their strategic plans, merely redirecting a portion of existing fund balances to Prop 10 priorities that would otherwise not be funded due to the budget crisis.

But again, respondents focus on the broad, general Prop 10 priority of helping children age 0-5 with their health and educational needs, rather than on the fact that the voters approved the additional tax on cigarettes *on the condition* that it be used for specified purposes through specified local delivery systems determined by designated experts and locally accountable commissions. If the legislature is so concerned with making sure that existing services to young children stay funded, they do have alternative means of doing so, by either imposing new taxes or by putting a measure on the ballot asking the voters to lift the restriction on using Prop 10 funds to maintain existing services.

Based on the evidence before the court, the court finds that neither Health & Safety Code §130157 nor Health & Safety Code §130158 further Prop 10 and neither are consistent with its purpose as articulated in the ballot measure itself as well as the arguments made to the voters in the official voter pamphlet. Thus these amendments could only be validly enacted by another vote of the electorate.

That leaves the issue of whether the court should invalidate AB 99 in its entirety or whether it can properly sever the invalid sections from §13056 which does nothing more than create a new Fund in the State Treasury, an act that was held in

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Shaw v.People ex rel. Chiang, supra, 175 Cal. App. 4th at 602-603, to be within the legislature's discretion.

Here, there are two factors that support a finding that the entire Bill must be invalidated:

1. there is no severance clause (as there is in Prop 10 itself)
2. the Bill was enacted as an urgency measure pursuant to a finding of necessity that is demonstrably inconsistent with clear restrictions on use of Prop 10 tobacco tax revenues, i.e. the passage of the bill was premised on a finding that it was necessary "in order for health services for children through five years of age to be preserved in the 2011-2012 fiscal year."

The court therefore finds that the entire bill is invalid, and that petitioners are entitled to the requested judgment on the peremptory writ.

As for the objections raised by respondents to petitioners' request for judicial notice, they seek notice of exhibits 12-15 (the press release, promotional pamphlets and briefing materials from the California State Assoc. of Counties), under Evid. Code §452(h) claiming that it authorizes judicial notice of "Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

But while the fact that the publications were produced might be judicially noticeable, that would not make the truth of what's contained in them subject to judicial notice, nor would it permit the court to make the leap of finding that they were actually distributed to the voters or the counties prior to Prop 10 being enacted.

On whether they are sufficiently relevant to allow judicial notice, plaintiffs claim that all four are part of the historic context within which Prop 10 was passed. They cite ***Amwest, supra***, 11 Cal.4th at 1256, as holding that "where a constitutional amendment is subject to varying interpretations, evidence of its purpose may be drawn from many sources, including the historical context of the amendment and the ballot arguments favoring the measure."

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But absent a showing that any of the four documents were in fact viewed by voters or other decision-makers prior to the passage of Prop 10, the fact that they were produced doesn't appear to make them sufficiently relevant to support the request for judicial notice.

That is in contrast to the official voter guide for example, judicial notice of which respondents don't oppose. That publication is judicially noticeable because it is "common knowledge" [§452(g)] that the Secretary of State prepares the voter guide and mails it to all registered voters. The court will therefore sustain the objections to taking judicial notice of exhibits 12-15.

As for Exhibits 18, 19, 20, 21, 22, 24, 25 and 28, in response to respondents' claim that these are "legislative materials not related to AB 99," plaintiffs argue that exhibits 18-22 are part of the historical context of AB 99 in that they show prior attempts to amend Prop 10 and whether or not those amendments were successful.

In relation to exhibit 18, the League of Women Voter's guide to Prop 28 on the 2000 ballot, the court agrees that it can take judicial notice of the fact that there was an attempt to repeal the $.50 per pack tobacco surcharge, but the guide itself is not an official publication and there is no evidence that anyone saw it.

In relation to exhibit 19, AB 1389, the court will judicially notice the fact that the bill was passed in 2008 that allowed for Prop 10 funds to be "conditionally loaned" to the legislature, and it finds that that is relevant to the issue of whether the legislature believed that Prop 10 funds were available for purposes other than as specified in Prop 10.

This is similar to the issue before the court in ***Shaw v. People ex rel. Chiang, supra***, 175 Cal. App. 4th at 602-603, where the court noted the fact that the legislature had borrowed money from the PTA trust fund in the past was evidence that it knew it had no right to outright transfer it. The court will therefore overrule the objection to judicial notice of exhibit 19.

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As for exhibit 20, the Legislative Analyst's summary of Prop 1D, it appears to be an official publication and to the extent the issue is whether Prop 1D attempted to transfer funds from the First Five Trust Fund to use for general fund purposes, the court will take judicial notice of the content of the initiative itself. But it cannot take judicial notice of the truth of the Analyst's summary as that is neither an official act nor a matter not reasonably subject to dispute. The objection is therefore sustained in part and overruled in part.

As for AB 17 (Prop 1D, exhibit 21), the court will take judicial notice of the fact that the legislature put Prop 1D on the ballot as well as the content of the ballot initiative, and that is relevant to the issue of whether the legislature believed such amendment of Prop 10 required voter approval. It will overrule the objection to that exhibit.

As for exhibit 22, the Statement of Vote published by the Sect. of State showing the results of the vote on Prop 1D, that too is an official publication and a fact that is capable of immediate and accurate determination. The objection to that exhibit is overruled as well.

As for exhibit 24, the legislative analyst's summary of the January, 2011 budget, and exhibit 25, the Assembly Budget Committee's preliminary conference committee report, the court will judicially notice the fact that the summary and report were produced, but it is neither necessary nor appropriate for the court to take notice of the truth of the statements made in those publications, since the court can simply look at the budget document itself (exhibit 23, judicial notice of which is not objected to). The objections to those two exhibits are therefore sustained.

As for exhibit 28 (SB 75), it is unclear both why respondents are objecting to that document and why plaintiffs are offering it, since the bill actually adopted was AB 99. The court will take judicial notice of the fact that SB 75 was prepared and considered by the Senate, but it will also take notice of the fact that it was not enacted. And since it

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is admittedly identical to AB 99, judicial notice is neither necessary nor relevant. The objection is therefore sustained.

It is so ordered.

Dated this 21 day of November, 2011.

Debra J. Kazanjian
Judge of the Superior Court